CLERK'S COPY.

578
L.C.

Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1929

No. 314

NILES BEMENT POND COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 9, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,445)

CLERK'S COPY.

578
1.0.

Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1929

No. 314

NILES BEMENT POND COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 9, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,445)

(34,445)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 314

NILES BEMENT POND COMPANY, PETITIONER,

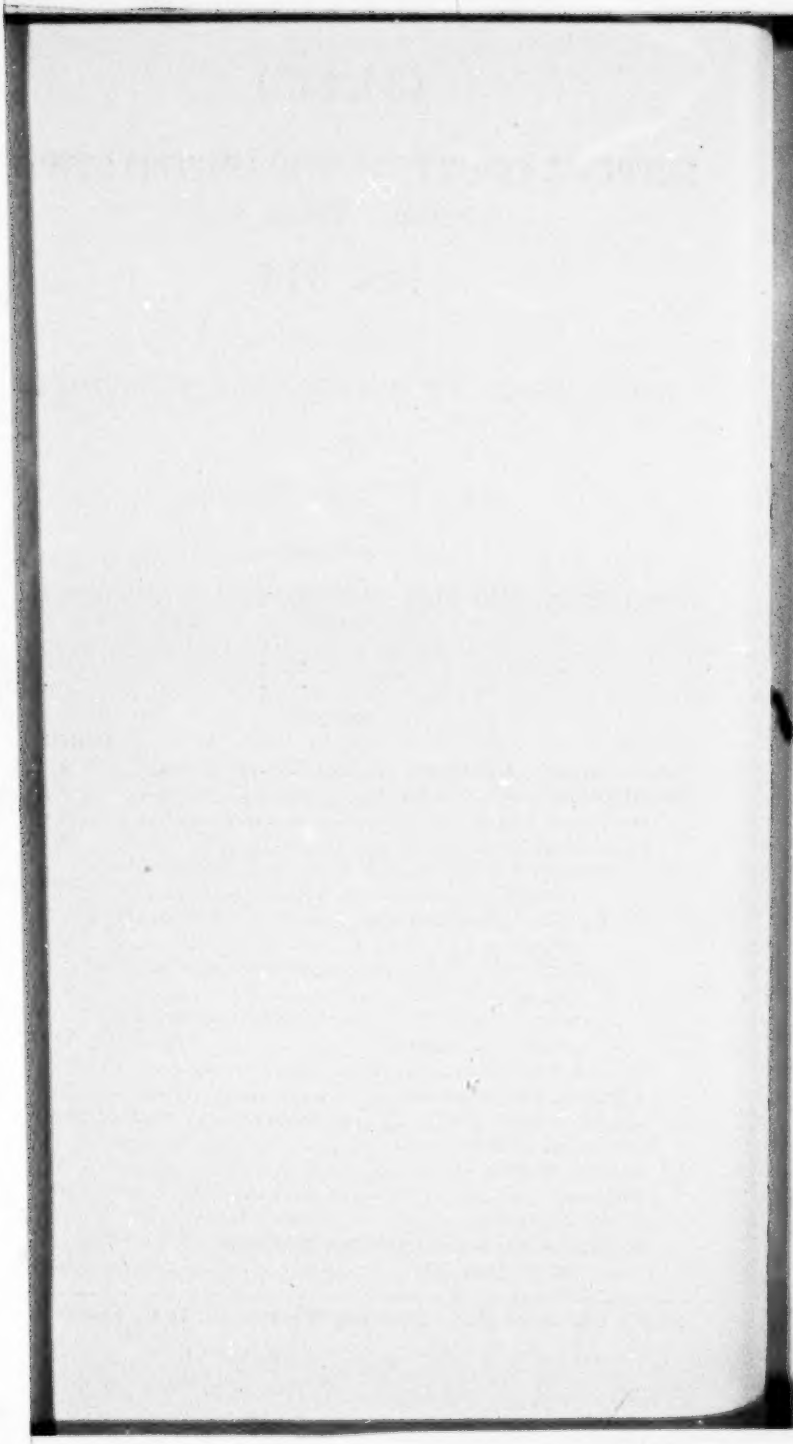
vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Petition for writ of certiorari	1	1
Record from Court of Claims	1	6
History of proceedings	1	6
Amended petition	1	6
Exhibit "A"—Claim for abatement (omitted in printing)	27	
Exhibit "B"—Claim for abatement (omitted in printing)	39	
Exhibit "C"—Claim for abatement (omitted in printing)	63	
Exhibit "D"—Letter from Treasury Department (omitted in printing)	77	
General traverse	79	26
Argument and submission	79	26
Special findings of fact	80	27
Conclusion of law	87	37
Opinion, Graham, J.	87	37
Judgment	90	40
Clerk's certificate (omitted in printing)	91	
Stipulation designating portions of the record to be omitted in printing	92	40
Order allowing certiorari		43



[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 314

NILES BEMENT POND COMPANY, Petitioner,

vs.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Niles Bement Pond Company respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

This suit was instituted in the Court of Claims to recover corporate income and profits taxes for 1917 and 1918 alleged to have been erroneously and illegally collected by respondent from petitioner. The question here presented is:

Whether petitioner was entitled in 1918 to a credit under Section 238 (a) of the Revenue Act of 1918 (Chap. 18, 40 Stat. L. 1057, 1080) for certain British income taxes and excess profits duties paid during 1918, where the first in-

[fol. 2] formation received by petitioner as to the amount of such taxes so payable was received in 1918 and the taxes were first entered upon petitioner's books during 1918 as an expense for that year in accordance with the method of accounting regularly employed by petitioner in keeping its books.

The findings of fact upon this question, (Nos. V to XI, inclusive) show:

During the year 1918 petitioner paid to the Government of Great Britain an income tax for the year ending April 5, 1918 and also an excess profits duty for the ac-

counting period ended December 31, 1916. These taxes were paid pursuant to notices, one dated January 24, 1918, and the other dated January 19, 1918, which notices were the first notice, assessment, demand or information received by petitioner as to the amount of the taxes so payable. Under the method of accounting regularly employed by petitioner in keeping its books throughout the year 1918, the accounting for expenses of its London Office was on a cash disbursements basis and no accruals were made for any such expenses in advance of their payment. The British taxes paid in 1918 were expenses of petitioner's London Office and were entered on the petitioner's books of account at the time of payment in 1918 in accordance with the method of accounting regularly employed in keeping petitioner's books. Except for expenses of the London Office and some additional small items where the cash basis was reflected, petitioner's books were kept on the accrual basis and the principal and dominant purpose and plan of its accounts were to show income upon an accrual basis as the general and controlling character of the accounts.

[fol. 3] It is not disputed that these taxes and duties were of the character allowable as a credit under Section 238 (a) of the Revenue Act of 1918. The question is whether such credit may be taken in the year 1918. The Commissioner of Internal Revenue disallowed the credit in 1918, thereby increasing the tax payable for that year. The tax was paid by petitioner and suit was filed by it in the Court of Claims for recovery. The Court of Claims held that credit was not properly taken in 1918 and dismissed the petition.

The question is whether credit may be taken (and the statutory provisions are the same as to the deduction of expenses) in the year of payment, when the method of accounting regularly employed calls for entry in the books of account on a cash disbursements basis, the majority of the taxpayer's accounts being upon an accrual basis but a considerable section of such accounts, as in this case all the London Office expense accounts of this petitioner, being on a cash basis.

The pertinent statutory provisions are in the Revenue Act of 1918, (Chap. 18, 40 Stat. L. 1057) and are as follows:

Section 238 (a). (40 Stat. L. 1080.) "That in the case of a domestic corporation the total taxes imposed for the taxable year by this title and by title III (Excess profits tax) shall be credited with the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country, upon income derived from sources therein * * *."

Section 200. (40 Stat. L. 1058.) "The term 'paid' for the purposes of the deductions and credits under this title, means 'paid or accrued' or 'paid or incurred,' and the terms 'paid or incurred' and 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed under Section 212."

[fol. 4] Section 212 (b). (40) Stat. L. 1064.) "The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. * * *"

B

Reasons Relied on for the Allowance of the Writ

1. The Court of Claims has decided an important question of Federal law which has not been but should be settled by this Court. That question is the meaning of the phrase "method of accounting regularly employed in keeping the books of such taxpayer" appearing in Section 212 (b) of the Revenue Act of 1918. This same phrase appears in the Revenue Acts of 1921, 1924, 1926, and 1928 and its correct construction and application is of the utmost importance to many taxpayers. This Court has decided the meaning of a similar phrase in the 1916 Act (Sec. 13 d of

Chap. 463, 39 Stat. L. 770) where the books were upon an accrual basis and the entries in question were made as accruals or should have been so made under the method of accounting regularly employed (*United States* vs. *Anderson* and *United States* vs. *Yale & Towne Company*, 269 U. S. 422, reversing *Anderson* vs. *United States*, 60 Ct. Cls. 106 and *Yale & Towne Company* vs. *United States*, 60 Ct. Cls. 440; *American National Company* vs. *United States*, 274 U. S. 99). This Court has also decided the meaning of the phrase in the 1918 Act, where the accounts were upon a cash basis (*United States* vs. *Mitchell*, 271 U. S. 9, reversing *Mitchell* vs. *United States*, 60 Ct. Cls. 451). This Court [fol. 5] has never considered or decided the meaning of the phrase where the majority of the taxpayer's accounts are upon an accrual basis but where a considerable portion of such accounts, due to some peculiar condition, such as the operation of the London Office of this petitioner, are upon a cash basis and the expenditure in question pertains to the latter group of accounts. The existing confusion and uncertainty as to the application of the statute to such mixed accounting systems will continue until the question is definitely settled by a decision of this Court.

2. The Court of Claims erred in holding that the statutory phrase 'method of accounting regularly employed in keeping the books of such taxpayer," describes only two systems of accounts, one a "strict cash basis" and the other a "strict accrual basis." The Court held, in effect, that books must be kept and income returned upon one or the other of these two bases. The governing statutes make no reference to or provision regarding either a "cash basis" or an "accrual basis" of accounts.

3. The Court of Claims erred in holding that petitioner was not entitled to a credit in 1918 for British taxes under Section 238 (a) of the Revenue Act of 1918, although it found as facts that such taxes were paid in 1918, and were entered on petitioner's book of account at the time of payment in 1918 in accordance with the method of accounting regularly employed in keeping such books.

4. The Court of Claims erred in considering as material the fact that accounts other than the London Office accounts to which the British taxes belonged, were kept on the "ac-

crual basis," and in holding that under a method of ac-
[fol. 6] counting upon a mixed accrual and cash disbursements basis a credit was allowable according to the basis of the majority of the accounts regardless of the basis of the particular account in which the expenditure belonged.

5. The Court of Claims erred in denying to petitioner its claim for credit for British taxes paid in 1918.

6. The Court of Claims erred in dismissing the petition and in entering judgment for the defendant.

Wherefore, your petitioner respectively prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Claims commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. E-177, Niles Bement Pond Company vs. United States, and that the said judgment of the Court of Claims may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Niles Bement Pond Company, by Karl D. Loos, E. Barrett Prettyman, Preston B. Kavanagh, Counsel for Petitioner.

Washington, D. C., August 9, 1929.

[fol. 7] [Endorsed:] Supreme Court of the United States, October term, 1929. No. —. Niles Bement Pond Company, petitioner, vs. The United States, respondent. Petition for writ of certiorari. Karl D. Loos, E. Barrett Prettyman, Preston B. Kavanagh, Counsel for Petitioner.

[fol. 1] COURT OF CLAIMS OF THE UNITED STATES

No. E-177

NILES BEMENT POND COMPANY

v.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On March 14, 1925, the plaintiff filed its original petition.

On May 13, 1925, the defendant filed a general traverse to said petition.

On March 26, 1927, by leave of court, the plaintiff filed its amended petition. Said amended petition is as follows:

II. AMENDED PETITION—Filed March 26, 1927

To the Honorable the Court of Claims:

The claimant, Niles Bement Pond Company, respectfully shows this Honorable Court:

1. Claimant is, and has been continuously for a period antedating all matters hereinafter stated, a corporation duly organized and existing under the laws of the State of New Jersey with its principal place of business at New York City. Claimant is now and was at all times hereinafter mentioned engaged in the business of manufacturing and selling machine tools in different states and territories of the United States and elsewhere.

[fol. 2] 2. Pursuant to the provisions of an Act of Congress entitled "An Act to Increase the Revenue, and for other Purposes," approved September 8, 1916, (39 Stat. L. 756), hereinafter referred to as the "Revenue Act of 1916" and of an Act of Congress entitled "An Act to Provide Revenue to defray war expenses, and for other Purposes," approved October 3, 1917 (40 Stat. L. 300), hereinafter referred to as the "Revenue Act of 1917," and particularly pursuant to Part II of Title I of said

Revenue Act of 1916 and Section 4 of Title I of said Revenue Act of 1917, claimant filed its corporation income tax return setting forth a statement and report of its net income for the calendar year 1917 and setting forth also other matters as required by said Revenue Acts of 1916 and 1917 and by Rules and Regulations promulgated thereunder by the Commissioner of Internal Revenue who is hereinafter referred to as the Commissioner. Pursuant to said Revenue Act of 1917 and particularly Title II thereof, claimant also filed its corporation excess profits tax return setting forth a statement and report of the net income and invested capital for the calendar year 1917 of claimant and of subsidiary companies, to-wit: Niles Bement Pond Company of Massachusetts and Pratt & Whitney Company of Delaware, which subsidiary companies were consolidated with claimant in said corporation excess profits tax return. Claimant owned the entire capital stock of said subsidiary companies and in accordance with the provisions of the Revenue Act of 1917 and Regulations issued thereunder by the Commissioner the income and invested capital of said subsidiaries was included and consolidated with the income and invested capital of claimant. The income and invested capital of said subsidiaries [fol. 3] is referred to herein only for the purpose of computing the taxes of claimant and by the term "consolidated invested capital," as hereinafter used, is meant the invested capital of claimant and its subsidiaries required by said Revenue Act of 1917 and the Regulations of the Commissioner thereunder to be consolidated with claimant, and by the term "consolidated income" is meant the total income of claimant and its subsidiaries required by the Revenue Act of 1917 and by regulations of the Commissioner thereunder to be consolidated with claimant. The taxes, if any, paid by the said subsidiaries are not relevant to this proceeding and the income and invested capital of said subsidiaries is relevant solely for the purpose of computing the taxes of claimant. Said returns were the subject of investigation and audit by said Commissioner and as a result thereof the tax liability of claimant for the calendar year 1917 on account of income and excess profits taxes was fixed by said Commissioner at the sum of $271,505.16, which said amount claimant has here-

tofore paid in full to the United States on to wit: June 7, 1918.

3. In the determination of the 1917 tax liability as aforesaid, the Commissioner made certain erroneous, improper, unlawful and wrongful rulings with reference to adjustments of the net income and invested capital for 1917 which rulings resulted in an unlawful, excessive, improper and erroneous determination of the tax liability of claimant for the calendar year 1917 and caused claimant to pay as income and excess profits tax an amount in excess of its true tax liability determined in accordance with the provisions of said Revenue Act of 1917, to-wit:

(a) The Commissioner refused to allow as a deduction [fol. 4] from income the sum of $15,000.00 paid by claimant during the calendar year 1917 to the Red Cross, and deducted by claimant on its corporation income tax return for 1917, in reporting the net income subject to tax under said Revenue Acts of 1916 and 1917. Payment of said sum was made by claimant in the regular course of its business. At the time of said payment the United States was engaged in a war with the German Empire and other foreign enemies and the Red Cross to which said payment was made was engaged in activities in aid of the prosecution of said war. Without making such expenditure the Company could not have continued to conduct its business. Under the circumstances and conditions then existing the expenditure of said sum was an ordinary and necessary expense of claimant and was therefore deductible in accordance with the provisions of Section 12a, paragraph 1, of said Revenue Act of 1916 in determining the net income of claimant subject to taxes under said Revenue Acts of 1916 and 1917.

(b) The Commissioner deducted from 1917 income the sum of $4,488.72 representing an income tax paid by claimant to the Government of Great Britain. Said sum was paid by claimant in the year 1918 and did not accrue as a liability of claimant until after the beginning of the calendar year 1918. Being neither a payment in 1917 nor an accrual in 1917, this tax payment to the Government of Great Britain as aforesaid was not a proper deduction in

determining the net income of claimant for the year 1917 subject to tax under the provisions of said Revenue Acts of 1916 and 1917.

(c) The Commissioner reduced the consolidated invested capital for 1917 by the amount of $35,875.37 alleged to be [fol. 5] a liability accruing in 1916 for taxes to the Government of Great Britain. Said sum was paid to the British Government during the calendar year 1918 but not before. No liability for the payment of said sum existed or had accrued prior to the beginning of the calendar year 1918. The deduction of this amount from the consolidated invested capital for 1917 was therefore erroneous.

(d) The Commissioner also reduced the consolidated invested capital for 1917 by an erroneous adjustment of the amount at which certain Pratt & Whitney Company stock owned by claimant was included in the consolidated invested capital. Claimant owned on December 31, 1916, and throughout the year 1917, and still owns 15,250 shares of common stock of Pratt & Whitney Company, a corporation organized under the laws of the State of New Jersey. Said stock was acquired by claimant in the year 1901 as compensation for services rendered, to-wit: certain underwriting and promotion services performed by claimant in the reorganization and rehabilitation of said Pratt & Whitney Company. In addition to the rendition of the services as aforesaid claimant also paid the sum of $154,420.94 in cash to the holders of the common stock of the Pratt & Whitney Company of Connecticut, the predecessor of the Pratt & Whitney Company of New Jersey, whose stock claimant acquired. In its corporation excess profits tax return for 1917 claimant reported said Pratt & Whitney stock at an amount of $1,525,000.00. The Commissioner in his computations has included said Pratt & Whitney stock at an amount of $154,420.94, this being the amount of cash paid by claimant to the stockholders of the predecessor as aforesaid, the Commissioner ignoring the compensation to [fol. 6] claimant for the underwriting and promotion services performed by it as aforesaid. The true and correct value of said 15,250 shares of common stock of said Pratt & Whitney Company of New Jersey, on the date acquired

by claimant, to-wit: January, 1901, was not less than the sum of $1,525,000.00. The said amount should therefore be included in the computation of the consolidated invested capital for 1917 in accordance with Section 207 of said Revenue Act of 1917. Said Pratt & Whitney stock was an asset, the income from which was not subject to the tax imposed by Title II of said Revenue Act of 1917. As such it was an inadmissible asset, but should be included in invested capital to the extent that it, combined with all other inadmissible assets, did not exceed the total indebtedness of claimant and its subsidiaries. The total of all inadmissible assets owned by claimant and its subsidiaries other than said Pratt & Whitney stock was $4,427,185.00. The total indebtedness of claimant and its subsidiaries was $5,143,526.37.

4. As a result of his erroneous rulings as aforesaid, the Commissioner fixed claimant's net income for 1917 at $1,797,062.40 and the consolidated invested capital for 1917 at $12,129,883.44. The Commissioner computed the tax due from claimant as follows:

Consolidated Net Income

Net income of claimant	$1,797,062.40
Net income of Niles Bement Pond Co. of Mass.	46,393.09
	$1,843,455.49
Less net loss Pratt & Whitney Co. of Delaware	4,871.07
Aggregate net income	$1,838,584.42
Deduct dividends received	19,680.00
Consolidated net income for excess profits tax purposes	$1,818,904.42

[fol. 7] **Consolidated Invested Capital**

Consolidated invested capital	$12,129,883.44

Computation of Excess Profits Tax

Consolidated invested capital		$12,129,883.44
Consolidated net income		1,818,904.42
	Income	Tax
Deduction 7% $849,091.84 + 3,000	$851,091.84	
Taxable at 20%	967,812.58	$193,562.52
	$1,818,904.42	$193,562.52

Allocation of Excess Profits Tax

Claimant	$174,966.61
Niles Bement Pond Co. of Mass. (arbitrary)	18,595.91
Total	$193,562.52

Computation of Total Tax

	Income	Tax
Net income of claimant	$1,797,062.40	
Deduct excess profits tax	174,966.61	
Taxable at 2%	$1,622,095.79	$32,441.92
Less dividends from 1916 and 1917 earnings	19,680.00	
Taxable at 4%	$1,602,415.79	64,096.63
Excess profits tax		174,966.61
Total tax assessed against claimant		$271,505.16

5. Claimant's net income determined in accordance with the provisions of the Revenue Act of 1917 was $1,786,-551.12. This differs from the income fixed by the Commissioner as aforesaid, as follows:

Net income fixed by Commissioner		$1,797,062.40
Deduct payment to Red Cross, not deducted by Commissioner		15,000.00
		$1,782,062.40
Add British taxes not paid or accrued until 1918 and erroneously deducted by Commissioner in 1917		4,488.72
Correct net income for 1917		$1,786,551.12

The consolidated invested capital for claimant and subsidiaries determined in accordance with the provisions of [fol. 8] the Revenue Act of 1917 was $12,727,679.24. This differs from the invested capital fixed by the Commissioner as aforesaid, as follows:

Consolidated invested capital fixed by Commissioner		$12,129,883.44
Add: British taxes paid and accrued in 1918 treated by Commissioner as a liability in 1916		35,875.37
Pratt & Whitney Stock:		
Correct amount	$1,525,000.00	
Amount allowed by Commissioner	154,420.94	
Amount disallowed by Commissioner	$1,370,579.06	
Less excess of inadmissibles over indebtedness:		
Total in admissibles (including Pratt & Whitney stock)	$5,952,185.00	
Total indebtedness	5,143,526.37	
Excess	808,658.63	
Amount to be added to invested capital on account of Pratt & Whitney stock		561,920.43
Correct invested capital 1917		$12,727,679.24

The correct computation of the tax payable by claimant under the Revenue Act of 1917 is as follows:

Consolidated Net Income

Net income of claimant	$1,786,551.12
Net income of Niles Bement Pond Co. of Mass.	46,393.09
	$1,832,944.21
Less net loss Pratt & Whitney Co. of Delaware	4,871.07
Aggregate net income	$1,828,073.14
Deduct dividends received	19,680.00
Consolidated net income for excess profits tax purposes	$1,808,393.14

Consolidated Invested Capital

Consolidated invested capital	$12,727,679.24

Computation of Excess Profits Tax

Consolidated invested capital		$12,727,679.24
Consolidated net income		1,808,393.14
	Income	Tax
Deduction 7% $890,937.55 + $3,000	$893,937.55	
Taxable at 20%	914,455.59	$182,891.20
	$1,808,393.14	$182,891.20

[fol. 9] **Allocation of Excess Profits Tax**

Claimant	$164,295.29
Niles Bement Pond Company of Massachusetts	18,595.91
Total	$182,891.20

Computation of Total Tax

	Income	Tax
Net income of claimant	$1,786,551.12	
Deduct excess profits tax	164,295.29	
Taxable at 2%	$1,622,255.83	$32,445.12
Less dividends from 1916 and 1917 earnings	19,680.00	
Taxable at 4%	$1,602,575.83	64,103.03
Excess profits tax	.....	164,295.29
Total tax due from claimant		$260,843.44

The total tax due from claimant under the Revenue Act of 1917 was not more than $260,843.44. To the extent that the tax paid and collected, to-wit: the amount of $271,505.16 exceeded the amount of $260,843.44, as aforesaid, the tax paid and collected was excessive, unlawful, improper,

without authority and illegally and erroneously collected, said excess being the amount of to-wit: $10,661.72.

6. On or about February 29, 1924, claimant filed a claim for refund of taxes illegally collected for the calendar year 1917, said claim being in the amount of $11,644.22 or such greater amount as is legally refundable. Copy of said claim for refund is attached hereto as Exhibit "A" and by this reference made a part hereof and incorporated herein. On or about January 27, 1921, within less than five years after the return for 1917 was due, claimant filed with the Commissioner of Internal Revenue at Washington, D. C., a waiver of right to have the taxes due for such taxable year determined and assessed within five years after the return was filed. As a result of the filing of said waiver, [fol. 10] the time for filing claim for refund was extended to six years after the return for the year 1917 was due, all as provided in Section 252 of the Revenue Act of 1921 as amended by Act of March 4, 1923. (Ch. 276, 42 Stat. L. 1504.) Said claim for refund was filed within less than six years after the return for 1917 was due.

7. Thereafter on or about September 22, 1924, the Commissioner rejected and denied the aforesaid claim for refund of taxes illegally collected for the year 1917, giving notice of such action by letter addressed to claimant and bearing date of September 22, 1924. Copy of said letter is attached hereto as Exhibit "D" and by this reference is made a part hereof and incorporated herein.

8. Pursuant to the provisions of an Act of Congress entitled "An Act to Provide Revenue, and for other Purposes," approved February 24, 1919 (40 Stat. L. 1057), said act being hereinafter referred to as the Revenue Act of 1918, and particularly pursuant to Part III of Title II and Title III of said Revenue Act of 1918, claimant filed its corporation income and profits tax return for the calendar year 1918, said return being a consolidated return of claimant and the Niles Bement Pond Company of Massachusetts, the latter a subsidiary owned by claimant, setting forth a statement and report of the consolidated net income and consolidated invested capital for the calendar year 1918 and setting forth also other matters as required by said Revenue Act of 1918 and by rules and regulations promul-

gated thereunder by the Commissioner. The invested capital and income of said subsidiary is relevant to this proceeding only for the purpose of computing the taxes of claimant. Said return was the subject of investigation and [fol. 11] audit by said Commissioner and as a result thereof the tax liability of claimant for the calendar year 1918 on account of income and war profits and excess profits taxes was fixed by said Commissioner at the sum of $1,719,644.93 which said amount claimant has heretofore paid in full to the United States, payment of the last installment having been made on to-wit: December 14, 1919.

9. In the determination of the 1918 tax liability as aforesaid, the Commissioner made certain erroneous, improper, unlawful, wrongful rulings with reference to adjustments of the net income and invested capital for 1918 which rulings resulted in an unlawful, excessive, improper and erroneous determination of the tax liability of claimant for the calendar year 1918 and caused claimant to pay as income and excess profits tax an amount in excess of its true tax liability determined in accordance with the provisions of said Revenue Act of 1918, to-wit:

(a) The Commissioner refused to allow as a deduction from income the sum of $61,018.00 paid by claimant during the calendar year 1918 to the American Red Cross, and other organizations engaged in activities in aid of the prosecution of the war. Payment of said sums was made by claimant in part by its New York office direct and in part through its branch offices. All of said payments were made by claimant in the regular course of its business. At the time of said payments the United States was engaged in a war with the German Empire and other foreign enemies and the Red Cross and other organizations to which said payments were made were engaged in activities in aid of the prosecution of said war. Without making such expenditures the Company could not have continued to conduct [fol. 12] its business. Under the circumstances and conditions then existing the expenditure of said sums was an ordinary and necessary expense of claimant and was therefore deductible in accordance with the provisions of Section 234 (a) (1) of said Revenue Act of 1918.

(b) The Commissioner reduced the invested capital of claimant for 1918 by the amount of $40,364.09 alleged to be a liability accruing in 1917 for taxes to the Government of Great Britain. Said sum was paid to the British Government during the calendar year 1918 but not before. No liability for the payment of said sum existed or had accrued prior to the beginning of the calendar year 1918. The deduction of this amount from invested capital for 1918 was therefore erroneous.

(c) The Commissioner also reduced the consolidated invested capital by an erroneous adjustment of the amount at which certain Pratt & Whitney Company stock owned by claimant was included in the consolidated invested capital. Claimant owned on December 31, 1917, and throughout the year 1918, and still owns 15,250 shares of common stock of Pratt & Whitney Company, a corporation organized under the laws of the State of New Jersey. Said stock was acquired by claimant in the year 1901, as compensation for services rendered, to-wit: certain underwriting and promotion services performed by claimant in the reorganization and rehabilitation of said Pratt & Whitney Company. In addition to the rendition of the services as aforesaid claimant also paid the sum of $154,420.94 in cash to the holders of the common stock of the Pratt & Whitney Company of Connecticut, the predecessor of the Pratt & Whit-
[fol. 13] ney Company of New Jersey, whose stock claimant acquired. In its corporation profits tax return for 1918 claimant reported said Pratt & Whitney stock at an amount of $1,525,000.00. The Commissioner in his computations has included said Pratt & Whitney stock at an amount of $154,420.94, this being the amount of cash paid by claimant to the stockholders of the predecessor company as aforesaid, the Commissioner ignoring the compensation to claimant for the underwriting and promotion services performed by it as aforesaid. The true and correct value of said 15,250 shares of common stock of said Pratt & Whitney Company of New Jersey, on the date acquired by claimant, to-wit: January, 1901 was not less than the sum of $1,525,000. Said amount should therefore be included in full in the computation of the consolidated invested capital for 1918 (before adjustment on account of inadmissible assets).

Said Pratt & Whitney stock was an inadmissible asset as defined in Section 325 of said Revenue Act of 1918 and must be included with other inadmissible assets in making adjustment of invested capital on account of inadmissible assets, as provided in Section 326 (c) of said Revenue Act of 1918. The total of inadmissible assets averaged during the year, exclusive of said Pratt & Whitney stock, was $4,070,633.03. The total of admissible and inadmissible assets averaged during the year, exclusive of said Pratt & Whitney stock, was $19,825,696.38. Including said Pratt & Whitney stock at the correct amount, the above totals were $5,595,633.03 and $21,350,696.38, respectively.

(d) In 1918 claimant paid to the British Government the sum of $44,126.40 representing excess profits tax and the sum of $4,488.72 representing income tax. These amounts [fol. 14] were actually paid in the calendar year 1918 and were credited by the claimant on its tax return against the total tax for 1918 in accordance with Section 238 (a) of said Revenue Act of 1918. Subsequent to the filing of said return claimant received a refund of part of said excess profits tax reducing the net amount thereof to $31,588.87. Said British taxes were not liabilities prior to the beginning the calendar year 1918. Each of said taxes was paid and accrued in the calendar year 1918, in accordance with the definitions and provisions contained in sections 200 and 212 (b) of said Revenue Act of 1918. Each of said British taxes should be credited against the total tax otherwise payable as provided in Section 238 (a) of said Revenue Act of 1918 and the total credit claimed is $36,077.59.

10. As a result of his erroneous rulings as aforesaid, the Commissioner fixed the consolidated net income for 1918 at $2,949,008.37 and the consolidated invested capital at $10,036,319.34. The Commissioner computed the tax due from claimant as follows:

Computation of Excess Profits and War Profits Credits

Consolidated net income 1918	$2,949,008.37
Consolidated invested capital 1918	10,036,319.34
Excess Profits Credit:	
8% of invested capital for 1918	$802,905.55
Exemption	3,000.00
Excess profits credit	$805,905.55

War Profits Credit:

10% of invested capital for 1918	$1,003,631.93
Exemption	3,000.00
War profits credit	$1,006,631.93

[fol. 15] Computation of Total Tax

		Income	Tax
Excess Profits Tax:			
Net income for 1918		$2,949,008.37	
Less excess profits credit		805,905.55	
Balance		$2,143,102.82	
Taxable at 30%		$1,201,358.32	$360,407.50
Taxable at 65%		941,744.50	612,133.93
		$2,143,102.82	$972,541.43
War Profits Tax:			
Net income for 1918		$2,949,008.37	
Less war profits credit		1,006,631.93	
Taxable at 80%		$1,942,376.44	$1,553,901.15
Less excess profits tax		.....	972,541.43
War profits tax		.....	581,359.72
Total excess profits and war profits tax		.....	$1,553,901.15
Income Tax:			
Net income for 1918		$2,949,008.37	
Less:			
Interest on obligations of United States not exempt	$11,909.06		
War profits and excess profits tax	1,553,901.15		
Exemption	2,000.00		
		1,567,810.21	
Taxable at 12%		$1,381,198.16	165,743.78
Total war profits, excess profits and income taxes			$1,719,644.93

11. Claimant's net income determined in accordance with the Revenue Act of 1918 was $2,887,990.37 T his differs from the income fixed by the Commissioner as follows:

Net income fixed by Commissioner	$2,949,008.37
Deduct payments to Red Cross and other organizations	61,018.00
Correct net income for 1918	$2,887,990.37

The consolidated invested capital for claimant and subsidiary determined in accordance with the provisions of the Revenue Act of 1918 was $10,431,052.17. This differs from

[fol. 16] the invested capital fixed by the Commissioner as follows:

Consolidated invested capital fixed by Commissioner		$10,036,319.34
Add: British taxes paid and accrued in 1918 treated by Commissioner as a liability in 1916 and 1917		40,364.09
Pratt & Whitney Stock:		
Correct amount	$1,525,000.00	
Amount allowed by Commissioner	154,420.94	
Amount disallowed by Commissioner	$1,370,579.06	
Less additional adjustment for inadmissibles	1,016,210.32	
Amount to be added to invested capital on account of Pratt & Whitney stock		354,368.74
Correct invested capital 1918		$10,431,052.17

The corrected computation of the tax payable by claimant for the calendar year 1918 under the Revenue Act of 1918 is as follows:

Computation of Excess Profits and War Profits Credits

Consolidated net income 1918	$2,887,990.37
Consolidated invested capital 1918	10,431,052.17
Excess Profits Credit:	
8% of invested capital for 1918	$834,484.17
Exemption	3,000.00
Excess Profits Credit	$837,484.17
War Profits Credit:	
10% of invested capital for 1918	$1,043,105.22
Exemption	3,000.00
	$1,046,105.22

Computation of Total Tax

	Income	Tax
Excess Profits Tax:		
Net income for 1918	$2,887,990.37	
Less excess profits credit	837,484.17	
Balance	$2,050,506.20	
Taxable at 30%	1,248,726.26	374,617.88
Taxable at 65%	801,779.94	521,156.96
	$2,050,506.20	$895,774.84
[fol. 17] War Profits Tax:		
Net income for 1918	$2,887,990.37	
Less war profits credit	1,046,105.22	
Taxable at 80%	$1,841,885.15	$1,473,508.12
Less excess profits tax		895,774.84
War profits tax		577,733.28
Total excess profits and war profits tax		$1,473,508.12

Income tax:

Net income for year 1918		$2,887,990.37	
Less interest on obligations of U. S. not exempt	$11,909.06		
War profits and excess profits tax as above	1,473,508.12		
Exeption	2,000.00		
		1,487,417.18	
Taxable at 12%		$1,400,573.19	$168,068.78
Total war profits, excess profits and income taxes			$1,641,576.90
Less income and excess profits taxes paid British government on income arising from sources therein:			
Income tax		$4,488.72	
Excess profits tax (net)		31,588.87	
Total credit			36,077.59
Total war profits, excess profits and income taxes payable for 1918			$1,605,499.31

The total tax due from claimant for the calendar year 1918 under the Revenue Act of 1918 was not more than $1,605,499.31. To the extent that the tax paid and collected, to-wit: the amount of $1,719,644.93 exceeded the amount of $1,605,499.31 as aforesaid, the tax paid and collected was excessive, unlawful, improper, without authority, and illegally and erroneously collected, said excess being the amount of to-wit: $114,145.62.

12. On or about March 14, 1924, claimant filed a claim for refund of taxes illegally collected for the calendar year 1918, said claim being in the amount of $127,264.02 or such greater amount as is legally refundable. Said claim for refund was filed within less than five years after the claimant's return for 1918 was due. Copy of said claim is at-
[fol. 18] tached hereto as Exhibit "B" and by this reference is made a part hereof and incorporated herein.

13. Thereafter on or about September 22, 1924, the Commissioner rejected and denied the aforesaid claim for refund of taxes illegally collected for the year 1918, giving notice of such action by letter addressed to claimant and bearing date of September 22, 1924. Copy of said letter is attached hereto as Exhibit "D" and by this reference is made a part hereof and incorporated herein.

14. Pursuant to the provisions of said Revenue Act of 1918 and particularly pursuant to Part III of Title II and

Title III of said Revenue Act of 1918, claimant filed its corporation income and profits tax return for the calendar year 1919, said return being a consolidated return of claimant and the Niles Bement Pond Company of Massachusetts, the latter a subsidiary owned by claimant, setting forth a statement and report of the consolidated net income and consolidated invested capital for the calendar year 1919 and setting forth also other matters as required by said Revenue Act of 1918 and by rules and regulations promulgated thereunder by the Commissioner. The invested capital and income of said subsidiary is relevant to this proceeding only for the purpose of computing the taxes of claimant. Said return was the subject of investigation and audit by said Commissioner and as a result thereof the tax liability of claimant for the calendar year 1919 on account of income and excess profits taxes was fixed by said Commissioner at the sum of $323,177.92 which said amount claimant has heretofore paid in full to the United States, payment of the last installment having been made on to-wit: December 15, 1920.

[fol. 19] 15. In the determination of the 1919 tax liability as aforesaid, the Commissioner made certain erroneous, improper, unlawful and wrongful rulings with reference to adjustments of the net income and invested capital for 1919 which rulings resulted in an unlawful, excessive, improper and erroneous determination of the tax liability of claimant for the calendar year 1919 and caused claimant to pay as income and excess profits tax an amount in excess of its true tax liability determined in accordance with the provisions of said Revenue Act of 1918, to-wit:

(a) The Commissioner reduced the consolidated invested capital by an erroneous adjustment of the amount at which certain Pratt & Whitney Company stock owned by claimant was included in the consolidated invested capital. Claimant owned on December 31, 1918, and throughout the year 1919, and still owns 15,250 shares of common stock of Pratt & Whitney Company, a corporation organized under the laws of the State of New Jersey. Said stock was acquired by claimant, in the year 1901, as compensation for services rendered, to-wit: certain underwriting and promotion services performed by claimant in the re-

organization and rehabilitation of said Pratt & Whitney Company. In addition to the rendition of the services as aforesaid claimant also paid the sum of $154,420.94 in cash to the holders of the common stock of the Pratt & Whitney Company of Connecticut, the predecesor of the Pratt & Whitney Company of New Jersey, whose stock claimant acquired. In its corporation excess profits tax return for 1919 claimant reported said Pratt & Whitney stock at an amount of $1,525,000.00. The Commissioner in his computations has included said Pratt & Whitney stock at an [fol. 20] amount of $15,420.94, this being the amount of cash paid by claimant to the stockholders of the predecessor Company as aforesaid, the Commissioner ignoring the compensation to claimant for the underwriting and promotion services performed by it as aforesaid. The true and correct value of said 15,250 shares of common stock of said Pratt & Whitney Company of New Jersey, on the date acquired by claimant, to-wit: January, 1901, was not less than the sum of $1,525,000.00. Said amount should therefore be included in full in the computation of claimant's invested capital (before adjustment on account of inadmissible assets). Said Pratt & Whitney stock was an inadmissible asset as defined in Section 325 of said Revenue Act of 1918 and must be included with other inadmissible assets in making adjustment of invested capital on account of inadmisible assets as provided in Section 326 (c) of said Revenue Act of 1918. The total of inadmissible assets averaged during the year, exclusive of said Pratt & Whitney stock, was $4,169,932.53. The total admissible and inadmissible assets averaged during the year, exclusive of said Pratt & Whitney stock, was $20,368,419.97. Including said Pratt & Whitney stock at the correct amount, the above totals were $5,694,932.53 and $21,893,419.97, respectively.

16. As a result of his erroneous rulings as aforesaid, the Commissioner fixed the consolidated invested capital for 1919 at $10,794,242.12. The Commissioner computed the tax due from claimant as follows:

[fol. 21] Computation of Tax (1919) at 1918 Rates

Excess Profits Tax:	Income	Tax
Net income for taxable year	$1,567,001.71	
Less excess profits credit	866,539.37	
Balance	$700,462.34	
Taxable at 30%	$700,462.34	$210,138.70
War Profits Tax:		
Net income for taxable year	$1,567,001.71	
Less war profits tax	1,082,424.21	
Taxable at 80%	$484,577.50	387,662.00
Less excess profits tax		210,138.70
War profits tax		177,523.30
Total excess profits and war profits tax (computed at 1918 rates)		$387,662.00

Computation of Tax (1919) at 1919 Rates

Excess Profits Tax:	Income	Tax
Net income for taxable year	$1,567,001.71	
Less excess profits credit	866,539.37	
Balance	$700,462.34	
Taxable at 20%	$700,462.34	$140,092.47
Total excess profits tax (Computed at 1919 rates)		$140,092.47

Summary of Excess Profits and War Profits Taxes

Total profits taxes at 1918 rates	$387,662.00
Total profits tax at 1919 rates	140,092.47
(1) Income from Government contracts	382,814.21
(2) Income from other sources	1,184,187.50
(3) Total taxable income for year 1919	$1,567,001.71
(4) Proportion of (1) to (3)	.2443
(5) Proportion of (2) to (3)	.7557
(6) Percentage of (4) applied to profits taxes at 1918 rates	$94,705.83
(7) Percentage of (5) applied to profits tax at 1919 rates	105,867.88
Total excess profits and war profits tax for 1919	$200,573.71

[fol. 22] Computation of Total Tax (1919)

Total excess profits and war profits tax		$200,573.71
Income Tax:		
Net income for taxable year	$1,567,001.71	
Less:		
Interest on obligations of United States not exempt	$35,166.70	
Excess profits tax	200,573.71	
Exemption	2,000.00	
	237,740.41	
Taxable at 10%	$1,329,261.30	132,926.13
Total excess profits and income taxes		$333,499.84
Total tax		$323,177.92

17. Claimant's invested capital for 1919 determined in accordance with the Revenue Act of 1918 was $11,132,-543.53. This differs from the invested capital fixed by the Commissioner as follows:

Consolidated invested capital fixed by Commissioner		$10,794,242.12
Add:		
Pratt & Whitney stock—correct amount	$1,525,000.00	
Amount allowed by Commissioner	154,420.94	
Amount disallowed by Commissioner	$1,370,579.06	
Less additional adjustment for inadmissibles	1,032,277.65	
Amount to be added to invested capital on account of Pratt & Whitney stock		338,301.41
Correct invested capital 1919		$11,132,543.53

The correct computation of the tax payable by claimant for the calendar year 1919 under the Revenue Act of 1918, without allowance for changes in the taxes for prior years, is as follows:

[fol. 23] Computation of Tax (1919) at 1918 Rates

Excess Profits Tax:	Income	Tax
Net income for taxable year	$1,567,001.71	
Less excess profits credit	893,603.48	
Balance	$673,398.23	
Taxable at 30%	673,398.23	$202,019.47
	$673,398.23	$202,019.47

War Profits Tax:

Net income for taxable year	$1,567,001.71	
Less war profits credit	1,116,254.35	
Taxable at 80%	$450,747.36	$360,597.89
Less excess profits tax		202,019.47
War profits tax		158,578.42
Total excess profits and war profits tax (computed at 1918 rates)		$360,597.89

Computation of Tax (1919) at 1919 Rates

Excess Profits Tax:	Income	Tax
Net income for taxable year	$1,567,001.71	
Less excess profits credit	893,603.48	
Balance	$673,398.23	
Taxable at 20%	673,398.23	$134,679.65
Total excess profits tax (computed at 1919 rates)		$134,679.65

Summary of Excess Profits and War Profits Taxes

Total profits tax at 1918 rates as above		$360,597.89
Total profits tax at 1919 rates as above		134,679.65
(1) Income from Government contracts		382,814.21
(2) Income from other sources		1,184,187.50
(3) Total taxable income for year 1919		$1,567,001.71
(4) Proportion of (1) to (3)		.2443
(5) Proportion of (2) to (3)		.7557
(6) Percentage of (4) applied to profits taxes at 1918 rates.		$88,094.06
(7) Percentage of (5) applied to profits taxes at 1919 rates.		101,777.41
Total excess profits and war profits tax for 1919		189,871.47

[fol. 24]

Computation of Total Tax (1919)

Total excess profits and war profits tax			$189,871.47
Income Tax:			
Net income for taxable year		$1,567,001.71	
Less:			
Interest on obligations of United States not exempt	$35,166.70		
Excess profits tax	189,871.47		
Exemption	2,000.00		
		227,038.17	
Taxable at 10%		$1,339,963.54	133,996.35
Total excess profits and income taxes			$323,867.82
Less foreign income war profits and excess profits taxes			10,321.92
Total tax			$313,545.90

The total tax due from claimant for the calendar year 1919 under the Revenue Act of 1918 was not more than $313,545.90. To the extent that the tax paid and collected, to-wit: the amount of $323,177.92 exceeded the amount of $313,545.90 as aforesaid, the tax paid and collected was excessive, unlawful, improper, without authority, and illegally and erroneously collected, said excess being the amount of, to-wit: $9,632.02.

18. On or about May 16, 1924, claimant filed a claim for refund of taxes illegally collected for the calendar year 1919, said claim being in the amount of $9,632.02 or such greater amount as is legally refundable. Said claim for refund was filed within less than five years after the claimant's return for 1919 was due. Copy of said claim is attached hereto as Exhibit "C" and by this reference is made a part hereof and incorporated herein.

19. Thereafter on or about September 22, 1924, the Commissioner rejected and denied the aforesaid claim for refund of taxes illegally collected for the year 1919, giving notice of such action by letter addressed to claimant and bearing date of September 22, 1924. Copy of said letter [fol. 25] is attached hereto as Exhibit "D" and by this reference is made a part hereof and incorporated herein.

20. Claimant's claim as aforesaid first accrued on or about November 16, 1922, when the Commissioner by letter addressed to claimant under date of November 16, 1922, first made the rulings with respect to income, invested capital and foreign tax credits for the several years 1917, 1918 and 1919 which rulings were erroneous and unlawful as aforesaid and on account of which erroneous and unlawful rulings the claim herein is made. Thereafter claims for refund were presented to the Commissioner as aforesaid and said claims for refund were denied and rejected on or about September 22, 1924, less than two years prior to the date of this petition.

21. The actions of the Commissioner hereinbefore described constitute the action by the Treasury Department on the claims herein set out and no other action has been had thereon in Congress or by any other Department.

22. Claimant is and always has been the sole owner of the claims herein set out and has not assigned or transferred the whole or any part thereof or interest therein.

23. Claimant is justly entitled to recover from the United States, on account of the several claims herein set out, the sum of $134,439.36, after allowing all just credits and offsets, together with interest thereon at six percent per annum as follows: on $10,661.72 from June 7, 1918, on $114,145.62 from December 14, 1919, and on $9,632.02 from December 15, 1920, until the date of payment.

24. The claimant and all its officers and stockholders have at all times borne true allegiance to the Government [fol. 26-78] of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

25. Claimant believes the facts as stated herein to be true.

Wherefore, the premises considered, claimant prays judgment against the United States in the full sum of $134,439.36 with interest thereon, as aforesaid.

Niles Bement Pond Company, by Edw. L. Leeds, Vice-President. Karl D. Loos, Attorney for the Claimant, 717 Munsey Bldg., Washington, D. C. E. Barrett Prettyman, of Counsel.

Duly sworn to by Edw. L. Leeds. Jurat omitted in printing.

[fol. 79] III. General Traverse—Filed May 5, 1927

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

Herman J. Galloway, Assistant Attorney General.
R. C. W.

IV. Argument and Submission

On October 11, 1928, this case was argued and submitted on merits by Mr. Karl D. Loos, for plaintiff, and by Mr. Ralph C. Williamson, for defendant.

[fol. 80] **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Graham, J.**—Filed May 13, 1929

This case having been heard by the Court of Claims upon the evidence, the court makes the following

SPECIAL FINDINGS OF FACT

I

The plaintiff, Niles Bement Pond Company, is and at all times since 1900 has been, a New Jersey corporation, with its principal place of business at New York City, and was throughout said period engaged in the business of manufacturing machine tools and selling such products in the various States of the United States, and in Great Britain and other parts of the world.

II

Plaintiff seasonably filed in proper form, Federal tax returns for the calendar years 1917, 1918, and 1919. Subsequent to the filing of the respective returns, the income and profits tax liability of plaintiff was determined and assessed for the year 1917 at $271,505.16; for the year 1918 at $1,719,644.93 and for the year 1919 at $323,177.92.

III

The total net payments of Federal income and profits taxes were made by plaintiff in the amounts and on the dates as follows:

1917. Paid June 6, 1918		$271,505.16	
1918. Niles Bement Pond Co. of Massachusetts:			
Paid Mar. 30, 1919		13,750.00	
June 17, 1919		13,750.00	
Sept. 11, 1919		13,750.00	
Dec. 17, 1919		13,750.00	
			$55,000.00
Niles Bement Pond Co.:			
Paid Mar. 30, 1919		662,500.00	
June 17, 1919		662,500.00	
Oct. 31, 1919		129,608.61	
Dec. 18, 1919		210,036.32	
			1,664,644.93
Total amount of tax shown to be due and paid.			1,719,644.93
[fol. 81]			
1919. Paid Mar. 31, 1920		$125,000.00	
June 26, 1920		125,000.00	
Sept. 15, 1920		55,557.49	
Dec. 15, 1920		17,620.43	
Total amount of tax shown to be due and paid.			$323,177.92

IV

Claims for refund for the years 1917, 1918, and 1919 were seasonably filed and were rejected on or about September 22, 1924.

V

Plaintiff during the year 1918 paid to the Government of Great Britain the sum of $4,488.72 representing income taxes for the year beginning April 6, 1917, and ending April 5, 1918, paid on income derived from sources within Great Britain, and no part of said amount was ever refunded to plaintiff. During the year 1918 plaintiff also paid to the Government of Great Britain the sum of $44,126.40 representing excess-profits duty for the accounting period ended December 31, 1916, paid on income derived from sources within Great Britain.

VI

Said amounts of $44,126.40 and $4,488.72, totalling $48,615.12 were claimed as a credit on the plaintiff's income and profits tax return for the calendar year 1918, said credit being claimed under section 238 of the revenue act of 1918. The tax paid by plaintiff for the year 1918 was computed and determined without the allowance of said amount, or any part thereof as a credit.

VII

Subsequent to the filing of the return for 1918, plaintiff received from the Government of Great Britain a net refund of $12,537.53, reducing the payment of British excess-profits tax to a net amount of $31,588.87.

VIII

The British income tax aforesaid was paid to the British Government pursuant to a notice dated January 24, 1918. The British excess-profits duty aforesaid was paid pursuant to a "Notice of assessment and notice to pay duty," dated January 19, 1918. Said notices were the first notice, assessment, demand, or information received by plaintiff as to the amount of the income tax and excess-profits duty,

respectively, so payable. The returns annually made by plaintiff to the British Government relating to income taxes and excess-profits duty contained no computation of the taxes; they contained only a report of income. Plaintiff in making its return of income did not attach any statement showing computation of the amount of the excess-profits duty payable by it for the accounting period ended December 31, 1916, or of the income tax for the year ending April 5, 1918.

[fol. 82] IX

Under the method of accounting regularly employed by plaintiff in keeping its books throughout the year 1918, the accounting for expenses of the London office was on a cash disbursements basis and no accruals were made for any such expenses in advance of their payment.

X

The British taxes paid in 1918 were expenses of plaintiff's London office and were entered on the plaintiff's books of account at the time of payment in 1918 in accordance with the method of accounting regularly employed in keeping plaintiff's books.

XI

British income tax in the amount of $10,321.92 for the year beginning April 6, 1918, and ending April 5, 1919, paid by plaintiff in 1919 was claimed as a credit on plaintiff's 1919 return and was allowed as such credit under section 238(a) of the revenue act of 1918. British income tax in the amount of $1,696.20 for the year beginning April 6, 1919, and ending April 5, 1920, was paid by plaintiff in 1924. No claim for credit was filed by plaintiff for 1920, nor was any such credit allowed; and no claim for credit was made in 1924, the plaintiff's return for that year showing a net loss and no tax due.

During the years 1916, 1917, 1918, and 1919, the books of the plaintiff were kept on the accrual basis. There were some exceptions in small items of deferred charges and credits in the plaintiff's accounts where the cash basis was reflected, but notwithstanding this the principal and dominant purpose and plan of its accounts were to show in-

come upon an accrual basis as the general and controlling character of the accounts.

Plaintiff's corporation income-tax return for the year 1916, its corporation income-tax return and its excess profits tax return for the year 1917, and its corporation income and profits tax returns for the years 1918 and 1919 were filed on the accrual basis.

The British income taxes paid by plaintiff in the year 1918 were assessed on account of income received in the years 1914, 1915, and 1916. The Commissioner of Internal Revenue allowed plaintiff deductions prior to 1918 for all of the British taxes in dispute. These taxes were based upon tax returns made by plaintiff prior to 1918.

XII

During all three of the calendar years 1917, 1918, and 1919 plaintiff owned 15,250 shares of the common stock of Pratt & Whitney Company, a corporation organized under the laws of the State of New Jersey.

XIII

Said stock was acquired by plaintiff in the year 1901 in the following manner:

In the year 1900, or shortly prior thereto, the then directors of the Pratt & Whitney Company determined that a reorganization and refinancing of that company was neces- [fol. 83] sary. After extensive negotiations arrangements were completed whereby the plaintiff undertook to formulate and execute such a plan of reorganization and refinancing. Among the conditions involved in this plan as finally agreed upon between the two companies was that the plaintiff should take over and assume the management of the Pratt & Whitney Company; that plaintiff should guarantee the dividends on the preferred stock of said Pratt & Whitney Company, and that the plaintiff should receive 15,250 shares of the common stock of the Pratt & Whitney Company, which were to be transferred to it by the former common stockholders of the Pratt & Whitney Company upon the payment to them of $10.00 cash per share. The total cash paid under this plan was $154,420.94. This plan was carried out during the year 1901 and the plaintiff thus acquired the said 15,250 shares of Pratt & Whitney common stock.

XIV

The following contract was executed under the date of July 9, 1900, and was thereafter performed substantially in accordance with its terms.

Parties

"Memorandum of Agreement entered into this ninth day of July, 1900, by and between the firm or co-partnership of Cuyler, Morgan and Company, of New York City, hereinafter called the first party, and Niles-Bement-Pond Company, hereinafter called the second party.

Purpose

Whereas the first party has been requested to reorganize in New Jersey the Pratt & Whitney Company, a Connecticut corporation, in such manner that its present preferred stockholders shall receive from the corporation as reorganized, preferred stock equal, in par value to 70% of the par value of their present holdings of preferred stock—that is, 12,250 shares of the preferred stock of the reorganized corporation, of the par value of $1,225,000, which shall constitute its entire issue of preferred stock, together with common stock of the reorganized corporation equal, in par value, to 30% of the par value of their present holdings of preferred stock—that is, 5,250 shares of the common stock of the reorganized corporation—of the par value of $525,000; and in such manner, further, that the present common stockholders of the Pratt & Whitney Co. shall receive from the corporation, as reorganized, common stock equal, in par value, to the par value of their present holdings of common stock; that is, 10,000 shares of the common stock of the reorganized corporation, of the par value of $1,000,000; and whereas the second party is desirous of acquiring and holding, when issued, the entire common stock of the reorganized corporation, that is, 15,250 shares of the par value of $1,525,000; all of which, will hereinafter more fully appear;

Consideration

Now, therefore, this agreement witnesseth, that the parties hereto, for and in consideration of the sum of one dol-

lar by each to the other in hand paid, the receipt whereof [fol. 84] is hereby acknowledged, as well as in consideration of the mutual covenants and promises herein contained, do covenant and agree as follows:

Organization of Proposed Corporation

First. The first party does covenant and agree to use its best endeavors and efforts to organize within thirty days after the date hereof, under the laws of New Jersey, a corporation, to be named "Pratt & Whitney Company," of perpetual existence, with a total authorized capital stock of $2,750,000 par value, divided into 12,250 shares of preferred and 15,250 shares of common stock of the par value of $100 each; which preferred stock shall be preferential both as to assets and dividends, which dividends shall be cumulative and payable quarterly at the rate of 6% per annum, and which preferred stock may be redeemed at par, plus accrued dividends, if any, by vote of a majority of the directors of said Pratt & Whitney Company, upon the first Monday of January, 1911, upon six months' notice by the said corporation to the holders thereof; and to procure all said stock, preferred and common, to be issued fully paid and nonassessable; that said Pratt & Whitney Company, if incorporated, to be organized in such manner that its real and personal property or either shall not be mortgaged except upon the consent in writing first obtained of the holders of 90% of its preferred stock issued and outstanding.

Property Thereof

Second. The first party does further covenant and agree to use its best efforts and endeavors to procure the said proposed Pratt & Whitney Company, immediately upon its organization as aforesaid, to take over and acquire, from the Pratt & Whitney Company, a Connecticut corporation, as of January 1, 1900, the entire plant and business, and all real and personal assets of the latter as a going concern, and to assume its liabilities as of that date, all such assets and liabilities to be as shown in the balance sheet of said the Pratt & Whitney Company of the date mentioned, a copy whereof is hereunto annexed and made a part of this agreement; the said plant and business, assets and lia-

bilities, to remain, between said January 1, 1900, and the date of actual transfer to the proposed Pratt & Whitney Company, and at the latter date to be, the same as shown in the said balance sheet, subject only, during such interval, to the fluctuations incident to the ordinary conduct by the present the Pratt & Whitney Company of the business of manufacturing and selling the regular products of its factory; and the said plant, business, and assets, as of the said January 1, 1900, if acquired by the proposed Pratt & Whitney Company, to be free and clear of all liabilities except those set forth in said balance sheet; and in the event of the said plant, business, and assets of the Pratt & Whitney Company being acquired by the proposed Pratt & Whitney Company, no dividends, accrued, credited, or declared upon the preferred or common stock of the present the Pratt & Whitney Company on or before January 1, 1900, to be deemed a liability of the said company, and all stock holders of the present the Pratt & Whitney Company, in writing, prior to the transfer herein contemplated, expressly to waive all right to such dividends, if any; and no dividends to have been or be declared, credited, or paid upon the said preferred or common stock subsequently to said January 1, [fol. 85] 1900, and all stockholders of the present the Pratt & Whitney Company, in writing, and prior to the transfer herein contemplated, expressly to waive all right to such dividends, if any.

Expenses of Organization

Third. It is understood and agreed by the parties hereunto that the organization of said proposed Pratt & Whitney Company shall in all respects be to the satisfaction of the second party, and that all expenses of such organization shall be borne by the proposed Pratt & Whitney Company, provided, however, that no expenses shall be incurred without the consent of the second party.

Purchase of Common Stock

Fourth. The first party and the second party do hereby covenant and agree that if the proposed Pratt & Whitney Company is organized in precisely the manner and with the property herein set forth, and if the first party shall sell or procure to be sold to the second party, 15,250 shares

of the fully paid nonassessable common stock of the said proposed corporation, at $10 per share, cash, immediately when issued, then that the second party will purchase said 15,250 shares of common stock at said price.

Guaranty of Preferred Stock

Fifth. And the said second party does further agree that if the said Pratt & Whitney Company is organized in exactly the manner and with the property herein set forth, and if the second party shall purchase the said stock, as aforesaid then that it, the second party, shall and will, in consideration of the sale to it of said common stock, enter into a contract of guaranty with the said proposed Pratt & Whitney Company, or the holders of the preferred stock of said proposed Pratt & Whitney Company, or both, that if upon any quarterly dividend day of the said proposed Pratt & Whitney Company its earnings applicable under its charter to dividends shall be insufficient to pay its preferred dividends then due and accumulated, then that it, the second party, shall and will pay to the proposed Pratt & Whitney Company such amount of money as, with the said earnings, if any, of the latter, will enable it to pay its said preferred dividends then due and accumulated, provided that the earnings of the said second party applicable under its charter to dividends shall at such time have been sufficient to enable it to pay all dividends then due and accumulated upon its preferred stock.

Winding Up

Sixth. The first party hereby covenants and agrees to recommend to present stockholders immediately after the purchase and sale of the plant and business of the present the Pratt & Whitney Company herein contemplated, to procure the said corporation to be completely and finally dissolved and wound up, according to the laws of the State of Connecticut.

Obligations Hereunder

Seventh. It is further understood and agreed that all covenants and promises herein made by the first party shall be obligatory upon the members of the said firm of Cuyler, Morgan & Company jointly and severally, and upon the heirs, executors, administrators, and assigns of them and each of them, and that the obligations of the second party hereunder shall be upon it, its successors or assigns.

[fol. 86] Execution

In witness whereof, upon the date first above written, the first party has hereunto set its hand and seal, and the second party has caused these presents to be executed under its corporate seal, by its president and secretary, thereunto duly authorized.

Cuyler, Morgan & Co., Niles-Bement-Pond Co. R. C. McKinney, President.

Attest: E. M. C. Davis, Secretary. (Corporate seal.)

The Pratt & Whitney Co. balance sheet at 31st December, 1899

Assets

Real estate and buildings, etc		$1,200,514.29
Plant (machinery, tools, and fixtures in use)		1,071,756.24
Inventory:		
Raw material and machinery in process	$420,028.00	
Finished machinery	586,056.23	
		1,006,083.23
Stock in other companies		72,877.67
Patents		40,041.33
Bills and accounts receivable		218,105.15
Cash		53,728.82
		3,663,106.73

Liabilities

Capital stock (outstanding):		
8% preferred	$1,750,000.00	
Common	1,000,000.00	
		2,750,000.00
Reserves for:		
Depreciation of plant	208,563.16	
Doubtful accounts	14,164.95	
		222,728.11
Bills and accounts payable		464,840.26
Profit and loss		225,538.36
		3,663,106.73

J. C. Stirling, Treasurer.

XV

The Pratt & Whitney Company stock at the time of its purchase and acquisition by the plaintiff in January, 1901, was worth $154,420.94, and did not cost the plaintiff any more than that sum, nor was anything other than the cash paid for it contributed by the plaintiff as consideration therefor. The value of the stock at the time it was purchased and sold to the plaintiff was said sum, $154,420.94, paid in cash for it. It afterwards apparently increased in value, but for what reasons and due to what causes does not satisfactorily appear.

XVI

The difference between the value at acquisition and the cash paid, namely, $1,370,579.06, was entered on plaintiff's books in August, 1902, as of June 30, 1902, as a part of its earned surplus and so remained throughout the years 1917, 1918, and 1919.

[fol. 87]

XVII

The commissioner in the determination and assessment of taxes for the years 1917, 1918, and 1919 decreased plaintiff's invested capital by the amount of $1,370,579.06 on account of said Pratt & Whitney stock, including said stock as an asset at the amount of $154,420.94 and no more.

XVIII

In its tax returns for each of the three years involved, plaintiff reported the 15,250 shares of Pratt & Whitney stock as an asset at an amount of $1,525,000.

XIX

The value of said Pratt & Whitney stock during the years 1917, 1918, and 1919 was no less than its value at date of acquisition in 1901.

XX

The consolidated invested capital before adjustment for inadmissibles, as determined by the commissioner, was as follows:

For the calendar year 1918	$12,727,775.00
For the calendar year 1919	13,675,858.98

The adjustments for inadmissibles were fixed by the commissioner as follows:

For the calendar year 1918:

(1) Average inadmissible assets during year	$4,225,053.97
(2) Average admissible and inadmissible assets during year	19,980,117.32
Percentage item (1) to item (2)	.211463
Invested capital before adjustment of inadmissibles	12,727,775.00
Deduction for inadmissibles, 21.1463% of $12,727,775.00	2,691,455.66

For the calendar year 1919:

(1) Average inadmissible assets during year	4,324,353.47
(2) Average admissible and inadmissible assets during year	20,522,840.91
Percentage item (1) to item (2)	.210708
Invested capital before adjustment of inadmissibles	13,675,858.98
Deduction for inadmissibles, 21.0708% of $13,675,858.98	2,881,616.86

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover and its petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be ascertained by the clerk and collected by him.

Opinion

Graham, Judge, delivered the opinion of the court:

This is a suit to recover taxes for which a claim for refund had been filed. It embraces three grounds of recovery. The first grows out of the claimed right to deduct income and excess profits taxes paid by plaintiff's branch in England to the British Government. The second involves invested capital for each of the years 1917, 1918, and 1919, and the question whether the value of certain stock

purchased by the plaintiff in 1901 should be allowed as a part of its surplus, and the third, whether the plaintiff [fol. 88] should be allowed deductions for amounts donated to the American Red Cross and other organizations of a similar character.

We will take up the last of these questions first, as to the donations to the American Red Cross. The facts and the principle of the applicable statutes are for all purposes no different from those in Consolidated Gas, Electric Light & Power Co. v. United States, 65 C. Cls. 252, 257, et seq., where a certiorari was denied on October 15, 1928, and the case of Afred J. Sweet, Inc., v. United States, decided by this court February 4, 1929. It therefore must be held that as to the credit for donations to the Red Cross and other organizations the plaintiff can not recover.

We will next take up the first question of the right to a credit for taxes paid the British Government. The right to recover depends in this instance upon whether the plaintiff kept its books on an accrual or cash basis. An examination of its books and its system of accounts by the Commissioner of Internal Revenue satisfied that official that they were kept on an accrual basis within the meaning of the statute, and he so ruled. It is admitted that no system of bookkeeping will probably be found which is on a 100% accrual basis. In almost every case where books are kept on an accrual basis, as a general principle of business, there are instances where certain accounts, small and sometimes covering a small percentage, are kept on a cash basis. We therefore concur in the ruling of the commissioner that the books were kept on an accrual basis.

The court has found that while it appears that some of the accounts of the plaintiff were kept upon a cash basis and the British account among them, it does not clearly appear what proportion was kept on the accrual basis, or that the greater proportion of its business was not kept upon the accrual basis as held by the Commissioner of Internal Revenue, and it does not satisfactorily appear that the commissioner was in error in concluding that the books were kept upon an accrual basis.

Without entering into a discussion of when a tax accrues, we conclude from what has just been said that the holding of the commissioner that the books were kept upon an accrual basis must be sustained, it not satisfactorily appear-

ing that in this he was in error, especially as it does not appear that the plaintiff presented any proof of the character of its general books of account in the United States either in 1918 or prior thereto. The presumption is in favor of the commissioner's finding and must be overcome. United States v. Rindskopf, 105 U. S. 418; United States v. Anderson, 269 U. S. 422. Where only a relatively small part has been on the cash basis it must be held that the income should have been returned upon an accrual basis. United States v. Anderson, supra; W. S. Barstow & Co., Inc. v. Bowers, 15 Fed. (2d), 75; Theodore Stanfield et al., 8 B. T. A., 787, 823; Hyams Coal Co. v. United States, 26 Fed. (2d), 805; and the Max Schott case, 5 B. T. A., 79.

Pratt and Whitney stock.—The plaintiff is here asking for a refund, which was refused, growing out of the following facts: The Commissioner of Internal Revenue in computing the income and excess-profits taxes of the plaintiff for the years 1917, 1918, and 1919, decreased the plaintiff's invested capital by reducing its earned surplus in the sum of $1,370,579.06, which represented the difference between [fol. 89] the cash paid, $154,420.94 for 15,250 shares of the stock of the Pratt & Whitney Company, which the plaintiff took over, and the par value of that stock, $100, which the plaintiff claims was its value at the time of the purchase. The plaintiff had deducted from this par value the cash purchase price actually paid and had passed the difference, the said sum of $1,370,579.06, to earned surplus. The commissioner held that it was not earned surplus, that the stock was worth the cash sum which the plaintiff paid for it at the time it was purchased and reduced its earned surplus accordingly, and upon this basis assessed a deficiency tax for each of these years.

The question is whether the commissioner was justified in the action which he took.

The court has found that the Pratt & Whitney Co. stock at the time of the purchase was worth no more than what the plaintiff paid for it, viz, $154,420.94, that it did not cost the plaintiff any more than this sum, nor was there anything other than the cash paid for it contributed by the plaintiff as consideration for it, and that the value of the stock at the time it was purchased and sold to the plaintiff was the cash sum paid for it. In view of this finding of the court the case is ruled by La Belle Iron Works v. United States (256 U. S.

377, 387, 388, 391). These considerations dispose of this branch of the plaintiff's claim, and the action of the Commissioner of Internal Revenue is upheld as to this claim.

It follows from the foregoing that the plaintiff is not entitled to recover on any one of the three claims set forth in its petition. The petition should be dismissed, and it is so ordered.

Sinnott, Judge; Green, Judge; Moss, Judge; and Booth, Chief Justice, concur.

[fol. 90] VI. JUDGMENT

At a Court of Claims held in the City of Washington on the 13th day of May, A. D., 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition is therefore dismissed.

Judgment is rendered against the plaintiff for the cost of printing the record herein, the amount thereof to be ascertained by the clerk and collected by him according to law, which amount is found to be $422.22.

[fol. 91] Clerk's certificate to foregoing trnscript omitted in printing.

[fols. 92 & 93] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1929

No. 314

NILES BEMENT POND COMPANY, Petitioner,

vs.

THE UNITED STATES

STIPULATION DESIGNATING PORTIONS OF THE RECORD TO BE OMITTED IN PRINTING

It is hereby stipulated and agreed, by and between petitioner by its counsel and the Solicitor General, as counsel

for the United States, that the following portions of the record certified by the Assistant Clerk of the Court of Claims, in the above entitled cause, to-wit, Pages 27 to 78, inclusive, of the amended petition to the Court of Claims, consisting of Exhibits "A" to "D," inclusive, attached to said petition, may be omitted from the record to be printed herein, for the reason that said exhibits are of no relevancy or materiality to the questions presented by the petition for certiorari herein.

Dated this 12th day of August, A. D. 1929.

Karl O. Loos, Counsel for Petitioner. Charles E. Hughes, Jr., Solicitor General.

Endorsed on cover: File No. 34,445. Court of Claims. Term No. 314. Niles Bement Pond Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed August 9, 1929. File No. 34,445.

(8952)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of proceedings below which accompanied the petition shall be treated as though filed in response to such writ.